TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 295

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD, PETITIONER

vs.

ROBERT H. CHAMBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1950
CERTIORARI GRANTED NOVEMBER 27, 1950

APPENDIX

INDEX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,351

ROBERT H. CHAMBERS,

Appellant,

vs.

BRIG. GEN. E. C. B. DANFORTH, JR., President,
Army Review Board,

Appellee.

Appeal from the United States District Court for the District of Columbia

---

JOINT APPENDIX TO BRIEFS

1 Filed Mar 29 1948 Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1280-'48

ROBERT H. CHAMBERS,
Broadalbin, New York,
Plaintiff,

v.

Brig. Gen. E. C. B. DANFORTH, Jr., President, Army Review Board, 2120 Sixteenth Street, N. W.
Washington, D. C.,
Defendant.

Complaint for Proceedings in the Nature of Mandamus

The plaintiff, for his cause of action herein, complains of the defendant and alleges:

FIRST: The plaintiff is a citizen of the United States and a resident of the State of New York; the defendant is a citizen of the United States and a resident of the District of Columbia. Jurisdiction of this court is invoked under Section 301 of Title II, D. C. Code, 1940 ed.

SECOND: The defendant is, upon information and belief, the duly appointed, qualified and acting President of the Army Disability Review Board, and as such President, by reason of directives issued by the Secretary of the Army exercises the powers and fulfills the functions conferred upon the Secretary of the Army by Section 302 of the Servicemens Readjustment Act of 1944, as amended.

THIRD: This is an action brought against the said defendant in his official capacity to obtain an order and judgment of this court requiring the said defendant to discharge his respective duties according to the requirements of the

statutes governing the functions of the Army Disability Review Board, and more particularly, to require said defendant to exclude from plaintiff's record any documents other than plaintiff's service records and documentary evidence submitted by plaintiff.

FOURTH: On or about June 22, 1944, the Congress enacted a statute known as the Servicemens Readjustment Act of 1944 (P. L. 346, 78th Cong. 2d Sess., Title 38 USC Secs. 693-697 inclusive).

Section 302(a) of that statute as amended provides *inter alia* that the Secretary of the Army shall establish boards of review consisting of five Army officers, two-fifths of whom shall be members of the Medical Corps, for the purpose of reviewing the findings and decision of retiring boards pursuant to whose decision an officer had been retired or released from active service without pay. The said section of said statute provides that:

"Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." A copy of the entire text of Section 302 is attached hereto and marked Exhibit "A".

FIFTH: After the passage of said Act the Secretary of War (now known as the Secretary of the Army) established the Secretary of War's Disability Review Board, (now known as Army Disability Review Board) and by regulations issued on or about October 21, 1944, provided that such Board should have a President who should have general charge of the business of the Board. The regulations provide by Paragraph 2, sub-paragraph (c) thereof that,

"The Adjutant General will assemble all available War Department and/or *other records* pertaining to the health and physical condition of the applicant. Such records together with the application and any supporting documents submitted therewith, will be transmitted to the president of the board." (Emphasis supplied)

3 The procedure followed at a hearing held by said Board is that the papers transmitted by the Adjutant General to the President of the Board are submitted to the Board which holds the hearing at the time of the opening of the hearing. These papers together with oral and documentary evidence submitted by the applicant constitute the record upon which the decision of the Board is based.

SIXTH: The plaintiff was honorably discharged as a Captain of the Army of the United States on October 2, 1942, for physical disability as the result of the findings and decision of a retiring board convened at Lovell General Hospital on August 5, 1942, and after the passage of the said statute duly applied for a review of his discharge by the Army Disability Review Board (then known as the Secretary of War's Disability Review Board).

A hearing was held pursuant to Section 302 of the said statute, and at said hearing the record presented to the Board was in accordance with the terms of the statute in that it consisted solely of the plaintiff's service records and evidence submitted by him.

SEVENTH: As a result of said hearing the Secretary of War's Disability Review Board on June 11, 1945, reversed in part and affirmed in part the findings of the Retiring Board pursuant to whose action the plaintiff had been discharged for physical disability. Plaintiff subsequently petitioned said board for a reconsideration and rehearing of his appeal for review, which petition was granted on May 19, 1947, and on September 10, 1947 plaintiff was notified that the rehearing would take place on October 10, 1947.

EIGHTH: On or about September 22, 1947, plaintiff and his counsel went to the Pentagon to the offices of the Army Disability Review Board for the purpose of
4 reviewing the record and preparing for the rehearing. Upon examining said record plaintiff and his

counsel found that certain Veterans Administration records bearing various dates in the year 1944, two years after plaintiff's discharge from the Army had been added to the record in plaintiff's case.

NINTH: Plaintiff, on September 24, 1947, acting through his counsel, protested by letter against the inclusion of these records on the ground that they were not service records; that the addition of these records was in violation of the plain words of the statute setting up the board and concluded with a request that the Veterans Administration records be removed from the file. A copy of said letter is attached hereto and marked Exhibit "B".

Pursuant to plaintiff's request the hearing was postponed until after a ruling had been made on this request.

TENTH: Under date of October 28, 1947, plaintiff's counsel was advised by letter signed by defendant that the request for removal of the Veterans Administration records was "not favorably considered". A copy of said letter is attached hereto and marked Exhibit "C".

ELEVENTH: Plaintiff's counsel, upon being advised of this ruling, requested by letter dated November 13, 1947, that the request be reconsidered, and was advised by letter dated December 9, 1947, and signed by defendant that "no reason is perceived" to change the original ruling on the request. Copies of said letters are attached hereto and marked respectively Exhibits "D" and "E".

TWELFTH: Plaintiff, through counsel, has thus made demand on defendant, and defendant has arbitrarily, unlawfully and wrongfully refused to exclude from plaintiff's record documents which are not, under the statute, properly a part of his record. Plaintiff's case is now set for rehearing on April 6, 1948, and plaintiff believes and, therefore, alleges that the defendant intends to include in the record to be submitted to the Board which will hear his case the said Veterans Administration records in violation of the express terms of the statute, which, as here-

tofore alleged, provides that such review shall be based upon "all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

THIRTEENTH: Plaintiff has no remedy at law, adequate, complete or otherwise.

WHEREFORE, plaintiff prays:

(a) That this court issue its mandatory order compelling the defendant to take such action as may be necessary to exclude from plaintiff's record any documents originating with the Veterans Administration and to restrict such record to plaintiff's service records and documents submitted by plaintiff as evidence.

(b) For such other, different and further relief as may to the court seem just and proper.

/s/ H. Russell Bishop
H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.
Attorney for Plaintiff

Driscoll and Bishop
Of Counsel.

• • • •

7 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "A"

Section 302 of the Service Men's Readjustment Act of 1944 (P. L. 346, 78th Congress, 2d Session; 38 USC Sec. 693) as amended.

(a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall

be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after June 22, 1944, whichever is the later.

(c) As used in this section —

(1) the term "officer" means any officer subject to the laws granting retirement for active service in the Army, Navy, Marine Corps, or Coast Guard, or any of their respective components;

(2) the term "counsel" shall have the same meaning as when used in section 693h of this title.

8 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "B"

September 24, 1947

Secretary of War's Disability Review Board
The Pentagon
Washington 25, D. C.

Docket No. 323
Case No. 94
Captain Robert H. Chambers, 0-268427

Attention: Lt. Col. R. O. Davidson
Executive Secretary

Gentlemen:

On behalf of my client, Captain Robert H. Chambers, it is hereby requested that the record in his case be corrected by removing therefrom certain reports from the Veterans Administration which have recently been added to his file. These records include a "Report of Examination at Completion of Observation Period of the Veterans Administration Facility at Canandaigua, New York, dated October 25, 1944; Special Neuropsychiatric Report made at Castle Point, New York, dated April 25, 1944, and Veterans Administration Medical Form 2545, dated May 16, 1944."

This is a proceeding under Section 302(a) of the Servicemen's Readjustment Act of 1944 as amended by Public Law 268, 79th Congress, and provides that the review therein provided for "shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

Captain Chambers was discharged on October 4, 1942, and any reports by the Veterans Administration subsequent to that date would not be a part of his service record. The term "service records" as used in the statute obviously means the records of the branch of the armed services of which the officer was a member prior to his discharge, and

does not include the records of other departments of the government.

It is accordingly requested that the reports of the Veterans Administration be removed from the file and that the hearing now set for October 10, 1947, be postponed until at least three weeks after the date of which the officer and his counsel shall have been notified of the ruling on this request.

Very truly yours,

HRB/1m

bcc: Mr. Chambers

9 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "C"

ECBD/evo

DEPARTMENT OF THE ARMY
Army Disability Review Board
Washington 25, D. C.

In Reply Refer
to Case No.: 94
Docket No.: 323

28 October 1947

Mr. H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.

Dear Mr. Bishop:

Further reference is made to your letter of the 24th of September 1947 and to my reply thereto under date of the 29th of September 1947 in connection with the rehearing of the case of Captain Robert H. Chambers, 0268427, Cavalry, Reserve, scheduled for the 10th of October 1947.

After full and careful consideration of your request, it has been determined that in view of the broad powers conferred on the Army Disability Review Board, both by statute and regulation, that the language of Section 302 of the Act of 22nd June 1944, as amended, which provides in pertinent part:

"* * * such review shall be based upon all available service records relating to the officer requesting such review and such other evidence as may be presented by such officer."

is descriptive in character and does not preclude consideration by the Army Disability Review Board, of otherwise admissible evidence obtained by the Board (on its own motion) from the Veterans Administration. Your request that the record in this case "be corrected by removing therefrom certain reports from the Veterans Administration which have recently been added to his file" is, therefore, not favorably considered.

In accordance with your request for postponement for at least three weeks after notification of the above decision, this case is rescheduled for hearing at 9:00 A.M. on the 24th of November 1947.

Very truly yours,
E. C. B. DANFORTH, JR.
Brigadier General, USA
President.

Exhibit "D"

November 13, 1947

E. C. B. Danforth, Jr., Brig. General, U.S.A.
President, Army Disability Review Board
Washington 25, D. C.

Reference Case No. 94
Docket No. 323
Robert H. Chambers

Dear General Danforth:

This will acknowledge receipt of your letter of October 28, 1947, being in further reply to my letter of September 24, 1947, which requested that the record in the case of Captain Robert H. Chambers be corrected by removing

therefrom certain reports from the Veterans Administration. The grounds for asking that these records be removed from the record was based upon the language used in Section 302 of the Act of June 22, 1944, as amended, which provides that the review of the action of a retirement board by the Disability Review Board shall "be based upon all available service records relating to the officer requesting such review and such other evidence as may be presented by such officer."

In replying to my letter and advising me that my request had not been favorably considered, you stated that the reasons for denying my request were that in view of the broad powers conferred on the Army Disability Review Board both by statute and regulation that the language in the statute was considered to be descriptive in character and would, therefore, not preclude consideration by the Board of otherwise admissible evidence obtained by the Board on its own motion from the Veterans Administration.

I have examined the opinion of the Judge-Advocate General which is the basis of your letter, but, for the reasons set forth below I am convinced that the opinion is erroneous.

1. The underlying basis for the conclusion reached by the Judge Advocate General seems to be the provision in the statute which states:

"In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decisions are being reviewed."

Proceeding from this the opinion relies upon Section 1248 of the Revised Statutes (10 U. S. C. 963) which provides:

"A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court martial and of a court of inquiry as may be necessary for that purpose."

and then cites paragraph 23a of AR 605-250 which provides that:

"The (retiring) board has the same power and authority as courts martial and courts of inquiry to compel the production of books, records, and papers material to the investigation." *Sec. R. 8 1248 (M. L. 1939, sec. 325)*

The opinion also cites sub-paragraph (a) of Paragraph 75 of the Manual for Courts-Martial concerning the general duties of the Court or retiring board with the powers of a court martial in regard to the introduction of evidence before such Court or board.

The Judge-Advocate General's opinion then quotes in part from the rules promulgated by authority of the Secretary of War governing procedure by the Army Retiring Board and quotes from those rules as follows:

"* * * The Adjutant General will assemble all available War Department and/or *other records* pertaining to the health and physical condition of the applicant. Such records together with the application and any supporting documents submitted therewith, will be transmitted to the president of the board."

7. "a. It will be the duty of the examiner to examine all War Department records and *all available evidence*, together with all contentions submitted on behalf of applicant and evidence in support thereof and to prepare an impartial written summary thereof, which shall be advisory in character only, and will set forth separately

* * * *

(5) Summaries of such pertinent War Department records or other evidence which may be material to the issue whether considered by the previous retiring board or not." (underscoring supplied.)

The opinion then concludes the language "such review shall be based upon all available service records, etc.," is descriptive in character. With this I agree. It is not merely descriptive, however, it is definitive, and describes by classification the documentary evidence which the Re-

view Board may consider, and this by necessary implication excludes from its consideration other documentary evidence except that offered by the officer. The conclusion reached by the Office of the Judge-Advocate General is tantamount to the conclusion that the term "service records" means service records plus such other documentary evidence as the Board in its absolute discretion may for reasons of its own wish to consider.

12

The interpretation of the statute and the conclusion set forth in the opinion of the Judge-Advocate General fails to take into consideration the scheme of the statute and the purposes for which it was enacted. The statute insofar as the Department of the Army is concerned was enacted for the purpose of enabling all officers who had been retired or released from active service without pay pursuant to the decision of an Army Retiring Board to a review of the findings and decision of the retiring board which had adjudicated his case. The statute in the sentence immediately following the sentence setting forth the duty of the board of review sharply delimits the evidence upon which such review shall be made by stating:

"Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

The reason for restricting the evidence to the service records of the officer is obvious. The Disability Review Board is set up for the purposes of determining whether or not the action of the retiring board should be sustained or reversed. The board of review in order to function within the intent of the statute must therefore place itself in the position of the retiring board whose action it is to review. This can only be accomplished by restricting the record to those facts which the retiring board had before it, in other words, to the service records of the officer which would, *ex necessitate*, include the proceedings of the retiring board, and "such other evidence as may be presented by such officer," which he may present for the pur-

pose of showing that the action of the retiring board was erroneous.

While it smacks of impertinence to lecture a board of army officers and especially the officers of the Judge-Advocate General upon the meaning of the term "service records" insofar as an Army officer is concerned, — I repeat the substance of my letter of September 24, 1947, that the term "service records" as used in the statute means, and can only mean, the sum total of all the papers contained in the Department of the Army relating to an officer from the time of his enrollment to the date of his discharge or retirement. It is axiomatic that in construing the words used in a statute that they will be given the meaning which is accorded them by the common understanding, and I submit, the term "service records" is universally understood by military men to mean what I have set forth above.

The subsequent provision that the review board "shall have the same powers as exercised by, or vested in, the board whose findings and decisions are being reviewed," in no way limits the provisions restricting the review to "service records." The inquiry here should be directed to determining what powers the retiring board had, because it is those powers, and no other, which are conferred upon the review board. It cannot be denied
13 that the retiring board had the powers conferred upon it by section 1248 of the Revised Statutes, and that those powers were virtually plenary for the purpose of making a full inquiry into "the nature and occasion of the disability of any officer."

The retiring board in this case, however, sat at Lovell General Hospital on August 18, 1942. However great the powers conferred upon that board by statute and regulations, there was one which it did not have and that is the power, or gift, of clairvoyance. That retiring board could not consider a report or reports to be written by another government agency two years subsequent to its deliberations, and by reason of the terms of the statute the review

board may not consider, as a part of the officer's service record, that which was not considered by the retiring board.

With respect to the regulations issued by the Secretary which directed the Adjutant General to assemble in addition to War Department records "other records pertaining to the health and physical condition of the applicant," it is submitted that inasmuch as such a direction attempts to enlarge the record beyond the limits set by the statute that it is invalid and is not authority for including the Veterans Administration records as part of Captain Chambers' service records. The Disability Review Board, while appointed by the Secretary of the Army, is a creature of statute and the mere conferring of the appointive power on the Secretary would not carry with it the power to make rules and regulations governing procedure before the Board enlarging or restricting the terms of the statute.

Captain Chambers, the same as any other applicant for review of his case by the Army Disability Review Board, is entitled to a review according to the terms of the statute giving him the right of review. He is not entitled to and does not ask for more than that accorded him by the statute, to require him to accept less than that is to work an injustice upon him and, in effect, to give him a review according to the rules and regulations of the Army instead of the review to which he is entitled by statutory grant.

In view of the foregoing it is asked that this matter again be reviewed and that the request contained in my letter of September 24, 1947, that the records of the Veterans Administration be removed from Captain Chambers' file and be returned to the Veterans Administration be granted. It is further requested that the date of the hearing now set for November 24, 1947, be postponed for a period of at least three weeks subsequent to a ruling on this request for reconsideration.

Respectfully yours,

HRB/as

14 Filed Mar 29 1948 Harry M. Hull, Clerk

Exhibit "E"

ECBD/cvo

DEPARTMENT OF THE ARMY
Army Disability Review Board
Washington

1280 - '48
9/December/1947

In reply refer
to Case No.: 94
Docket No.: 323
Mr. H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.
Dear Mr. Bishop:

Reference is made to your letter of 13 November 1947, renewing your request that certain Veterans' Administration records be removed from the case file of Captain Robert H. Chambers, 0268427, Cavalry, Reserve, the review of whose case has previously been scheduled for 10 October 1947 and 24 November 1947 and postponed at your request.

After reexamination of the opinion of The Judge Advocate General in the light of the questions raised in your letter of 13 November 1947, no reason is perceived to depart from the views expressed to you in my letter of 28 October 1947, nor to change the decision with respect to the Veterans' Administration records in Captain Chambers' file. This office, therefore, adheres to its position in not favorably considering your request of 24 September 1947 for removal of the records in question.

This case is accordingly rescheduled for hearing at 9:00 A. M., 8 January 1948. If this date is not agreeable to you, kindly advise this office.

Very truly yours,
E. C. B. DANFORTH, JR.
Brigadier General, USA
President.

• • • •

15 Filed Jan 12 1949 Harry M. Hull, Clerk

Motion to Dismiss

Comes now the defendant, by George Morris Fay, United States Attorney in and for the District of Columbia, and D. Vance Swann and William T. Becker, Attorneys, Department of Justice, and moves the court to dismiss this case for lack of jurisdiction and in support thereof alleges as follows:

I

The complaint fails to state a claim against the defendant or the United States Government upon which relief can be granted.

II

The court has no jurisdiction to hear and consider this action.

III

The complaint fails to set forth a sufficient statement of the grounds upon which the court's jurisdiction depends and cites no statute authorizing a suit of this nature against the United States of America or its agents as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure.

IV

This action, which is in the nature of a mandamus, would not lie against the defendant who acted within the scope of his official capacity in the proper exercise and discretion committed to him by statute.

V

The plaintiff has not exhausted his administrative remedies in the Department of the Army.

16

VI

Judicial review of the action of the Army Discharge Review Board is precluded by statute (Section 693h, Title 38, U. S. C. A.).

VII

The United States has not consented to be sued or that its agents acting in the scope of their official authority for the United States can be sued in a case of this nature.

VIII

This action in the nature of a mandamus would not lie against the President of the Army Review Board or the Secretary of the Army who are vested by statute with discretion to determine the type of discharge and/or who is entitled to retirement pay.

IX

There is no statutory authority upon which this action can be based.

WHEREFORE, the defendant prays that this motion to dismiss be granted.

/s/ George Morris Fay
George Morris Fay
United States Attorney

/s/ D. Vance Swann
D. Vance Swann
Attorney, Department of Justice

/s/ William T. Becker
William T. Becker
Attorney, Department of Justice

• • • •

25 Filed Apr 25 1949 Harry M. Hull, Clerk

Informal Memorandum

The complaint herein must be dismissed. It clearly appears that plaintiff has not exhausted his administrative remedies. Upon that ground alone the action is prematurely brought. Aside from that consideration however the complaint must be dismissed upon its merits. This court lacks jurisdiction to control the admissibility of evidence by an administrative board by mandamus. Keim v. United States, 177 U. S. 29. The action of the defendant board was a matter within the discretion of the board. It was not ministerial in the sense that it may be controlled by mandamus but requires the exercise of judgment. The courts will not guide and control executive boards in the matters committed to the judgment and discretion thereof in the discharge of official duties.

Counsel for defendant will submit an appropriate order dismissing the complaint.

/s/ F. Dickinson Letts
F. Dickinson Letts
Judge

• • • •

26 Filed Apr 27 1949 Harry M. Hull, Clerk

Order

This cause coming on to be heard on the defendant's motion to dismiss, and the court after hearing argument of counsel being fully advised in the premises is of the opinion that the court is without jurisdiction in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's moton to dismiss be and

the same, is hereby sustained and that this case is dismissed with prejudice at the cost of the plaintiff.

/s/ F. Dickinson Letts
F. Dickinson Letts
Judge

APPROVED AS TO FORM:
/s/ H. Russell Bishop
H. Russell Bishop
Attorney for the Plaintiff

• • • •

27 Filed May 9 1949 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this *ninth* day of *May*, 1949, that *the above-named plaintiff* hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the *27th* day of *April*, 1949 in favor of *defendant and* against said *plaintiff, dismissing the complaint.*

/s/ H. Russell Bishop
Attorney for *Plaintiff*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351 April Term, 1950

Wednesday, March 22, 1950

* * * * *

ROBERT H. CHAMBERS, *Appellant*

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*

Before Honorable Harold M. Stephens, Chief Judge, and E. Barrett Prettyman, Circuit Judge, and J. Kimbrough Stone, Circuit Judge sitting by designation.

Argument commenced by Mr. H. Russell Bishop, attorney for Appellant, continued by Mr. Thomas E. Walsh, attorney for Appellee, and concluded by Mr. H. Russell Bishop.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351. April Term, 1950.

ROBERT H. CHAMBERS, *Appellant*

v.

BRIG. GEN. E. C. B. DANFORTH, JR., President, Army Review Board, *Appellee.*

Before: Stephens, Chief Judge, Prettyman and Stone, Circuit Judges.

Order

Upon consideration of appellant's motion to substitute Colonel Henry S. Robertson herein in the place and stead of appellee Brig. Gen. E. C. B. Danforth, Jr., on the ground that Brig. Gen. E. C. B. Danforth, Jr., was relieved of his duties as President of the Army Review Board during the pending appeal, and that Colonel Henry S. Robertson was appointed as his successor on November 12, 1949;

and it also appearing that this motion to substitute has been served upon counsel for Colonel Henry S. Robertson and Brig. Gen. E. C. B. Danforth and that counsel for these parties has filed no objections thereto, It is

ORDERED by the Court that Colonel Henry S. Robertson be, and he is hereby, substituted as appellee herein in the place and stead of appellee Brig. Gen. E. C. B. Danforth, Jr.

Per Curiam

Dated April 3, 1950.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*

Appeal from the United States District Court for the District of Columbia.

Argued March 22, 1950 Decided June 12, 1950

Final brief filed May 3, 1950

Mr. H. Russell Bishop for appellant.

Mr. Thomas E. Walsh, Attorney, Department of Justice, with whom *Assistant Attorney General Morison* and *Mr. George Morris Fay*, United States Attorney, were on the brief, for appellee. *Mr. Joseph M. Howard*, Assistant United States Attorney, also entered an appearance for appellee.

Before STEPHENS, Chief Judge, and PRETTYMAN and KIMBROUGH STONE,* Circuit Judges.

---

* Sitting by designation.

STONE, Circuit Judge: Appellant was honorably discharged without pay as a Captain of the Army, for physical disability, by a decision of an Army Retiring Board. After the subsequent passage of the Servicemen's Readjustment Act, he applied for a review of his discharge by a Disability Board of Review (38 U. S. C. A. § 693 i (a)). A hearing before the Board of Review resulted in part affirmance and part reversal of the findings of the Retiring Board. On his petition, appellant was granted a rehearing and reconsideration. Prior to the rehearing, appellant discovered that certain reports of the Veterans' Administration (much later than his discharge) had been added to the record to be considered by the Board of Review on the rehearing. After ineffectual attempts to have these reports withdrawn, he brought this action, in the nature of mandamus, to compel such removal before the rehearing. Because of this action the rehearing has not yet been held. The trial court sustained a motion to dismiss resulting in this appeal.

The grounds, stated by the court, for the dismissal were: (1) that the action was prematurely brought before appellant had exhausted his administrative remedies; and (2) that, aside from such situation, mandamus would not lie because the matter involved was the admissibility of evidence which was within the judgment or discretion of the Board and not a purely ministerial act. The same two issues are presented here.

At oral argument, appellant was allowed time to file a reply brief and appellee to file a brief in rebuttal. For the first time, appellee, in his rebuttal brief, presents two new grounds for affirmance of the judgment. Those are (1) that appellant has had his case reviewed and the Board decision has been approved by the President and he now has no judicial remedy since the granting of a rehearing is within the discretion of the Board and not required by the statute; and (2) that the challenged procedure has been followed by the Board in over three thousand instances and, therefore, this extended administrative construction of the statute is "entitled to great weight and should not be overturned, unless clearly wrong or unless a different construction is plainly required."

Orderly consideration of the issues will be served by an initial disposition of these two "afterthought" matters. As to the first, there is nothing in this record to show that the former decision of the Board ever reached the President or indeed passed beyond the Board before the rehearing was granted—the contrary is the clear implication of the record here. True, a rehearing by the Board is not provided in the statute; however, there is nothing expressed or implied in the statute preventing the Board according a rehearing so long as the matter has not passed from its control. Such rehearing is provided for in the Regulations of the War Department

applying to such reviews and such Regulation does not violate the statute.

As to the second, a short answer would be that the record here is barren of evidence of any long continued and much used administrative practice. However, even accepting the factual basis of long administrative action (as stated in the rebuttal brief), this simply brings into play the rule that such practice should not be overturned unless a different practice is plainly required by the statute. Whether there is here such plain requirement will be determined hereinafter.

Premature Action

The contention that the action was prematurely brought is that appellant had not exhausted his administrative remedies. The supporting argument as to non-exhaustion of administrative remedies is that appellant has been accorded a rehearing; that the Board has not, as yet, considered this evidence nor held the rehearing; and that, until it does so, he has made no showing of injury—in fact, this very evidence might constitute the reason for and result in a determination in his favor by the Board on the rehearing.

For legal authority, the argument relies upon a long line of cases, of which Lichter v. United States, 334 U. S. 742, 791, is the latest expression by the Supreme Court. These announce the general rule that, where Congress has provided an administrative procedure, such procedure must be exhausted before there can be resort to the courts. An application of this rule closer to our issue is that of cases which forbid court intervention where the matter complained of is not a final determination of the administrative body but is preliminary or merely procedural.[1] However, these wise legal rules are not without exceptions necessary to preserve fundamental rights of the litigant (Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752, 773; Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 343) or to prevent a violation of express statutory limitations placed by the Congress upon the powers or actions of an administrative body (Dismuke v. United States, 297 U. S. 167, 172).

The present action is directed at a procedural matter before final administrative determination. Therefore, it is premature unless within an exception. This depends upon the fact situation and the pertinent statute.

The fact situation is undisputed, being admitted by the motion to dismiss and, apparently, conceded otherwise. This fact is that

[1] Rochester Telephone Corp. v. United States, 307 U. S. 125, 130; Federal Power Comm'n v. Metropolitan Edison Co., 304 U. S. 375, 383-385; Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51.

the Veterans' Administration reports, made after discharge of appellant, are not "service records relating to" appellant.

The Boards of Review were authorized and their powers, duties and procedure defined in section 693i of Title 38 U. S. C. A., pocket part p. 166. The pertinent part is subsection (a), which is

> "The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer, retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case."

Broadly, the statutory method required is that the Board shall hear and determine the matter and shall transmit its "proceedings and decision" to the proper Secretary (Army, Navy or Treasury), who shall lay the same "before the President for his approval or disapproval and orders in the case." Under this prescribed method for administrative action, no notice of the decision of the Board nor any opportunity to test the soundness of the decision of the Board is prescribed.

We do not suggest that it was constitutionally necessary for the Congress to provide such opportunity. The "right" here is entirely created by and dependent upon the statute and involves possible liability of the sovereign. Such character of right may be granted upon such terms as the Congress may elect. In such situa-

tions, about the only "right" of the litigant, if he is within the statute, is to have the administrative procedure confined to the requirements of the statute. That is what appellant is trying to do in this action. From what has been shortly before expressed, it is clear that the statutory administrative method affords no opportunity, after decision by the Board, for appellant to confine the Board to the statutory procedure. On the other hand, the statute does not prohibit the intervention of the courts to compel compliance with the statute by the Board. There is no suggestion that the rights of appellant can be protected by some later and other remedy than intervention by a court into the administrative proceeding, such as suggested in Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 774. Nor can the courts alter a determination by the President. Therefore, any court intervention, to be effective, must be before a decision by the Board or, at least, must be initiated before such decision (compare Aircraft & Diesel Corp v. Hirsch, 331 U. S. 752, 755 note 39, and Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 621-622). In this situation, we conclude that judicial intervention is here permissible and that a proper action to protect the rights of appellant is not premature (United States *ex rel.* v. Interstate Commerce Commission, 252 U. S. 179). Whether this action was the proper one is the second issue before us.

Mandamus

Appellee challenges that this action—in the nature of mandamus—is not proper here because the act to be required thereby is not purely ministerial. The hornbook rule has been recently well stated by this court (Hammond v. Hull, 131 F. (2d) 23, 25) as follows: "The writ [mandamus] should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. . . ."

The fact situation is undisputed that the Veterans' Administration reports here are not "service records" within the meaning of section 693i. The contest is over the powers given the Board by this section.

Appellant contends that the section requires a review to be confined to consideration of his service records and such other evidence as he may present. This is grounded on the language of the section: "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

Appellee contends that this language is not exclusive but is merely "descriptive" and that inclusion or exclusion of the reports involves an exercise of discretion and judgment. It is urged that this position is established by the further language of the section and by the powers of the Retiring Board to which the lan-

guage refers. This part of the section is: "In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed." The Retiring Board pertinent provision is Title 10 U. S. C. A. § 963, which is: "*Inquiry into and determination of facts.* A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose."

Each of the parties has stated a contention which, if true, would rule this issue his way. The crux is whether the language of the section relied on by appellee modifies or affects that relied on by appellant. If this presented a doubtful situation where the language urged by appellant did not plainly carry and require the meaning he asserts, we would hesitate to uphold this remedy (United State *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204). However, the requirement of the section is clear and unequivocal. The vital expression is that "such review *shall be based upon* . . ." (emphasis added). These words are words of exclusion of all evidence not specified in that sentence. The language urged by the appellee does not qualify this requirement. In fact, if it affected this requirement in any way, it would be to destroy it entirely. This is true because, if the Board can consider any evidence other than the service records and such as the officer might present, such action would clearly allow the Board to *base* its decision in whole or part upon this additional proof. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. . . .' Market Co. v. Hoffman, 101 U. S. 112, 115" (*Ex parte* The Public National Bank of New York, 278 U. S. 101, 104).[2] The general language emphasized by appellee can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed required evidentiary basis for decision by the Board.

In principle and in fact situation, United States *ex rel.* v. Interstate Commerce Commission, 252 U. S. 178, closely parallels this case. There the action was to compel consideration of evidence, excluded by the Commission, which the statute expressly required to be considered. Also, that action was in an initial stage (United

---

[2] Two recent cases in this Court are Fisher v. District of Columbia, 164 F. (2d) 707, 708 and United States v. Public Utilities Commission, 151 F. (2d) 609, 613.

States *ex rel.* v. Los Angeles & Salt Lake Railroad Co., 273 U. S. 299, 310). While this case has been confined (Interstate Commerce Commission v. N. Y., N. H. & H. R. Co., 287 U. S. 178, 204), yet it is still authority for the use of mandamus "where the departure from the statute is clear beyond debate" (Interstate Commerce Commission v. N. Y., N. H. & H. R. Co., *supra* p. 204; and see Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 622; United States *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. United States *ex rel.* Waste Merchants Assoc. of N. Y., 260 U. S. 32, 35). Here the ground for allowing mandamus is much stronger than in 252 U. S. 178. There, a remedy in the later stages existed which would fully protect the petitioner. Here, there is no prescribed remedy and no later opportunity to protect the statute-given rights of appellant.

Nor is this a case where final decision, if it is to be effective, should be deferred until after the decision of the Board (*Cf.* Aircraft & Diesel Equipment Co. v. Hirsch, 331 U. S. 752, 775 note 39). Here the fact situation is undisputed; the statute is clear; and the violation thereof by the Board is plain.

The judgment is reversed and the case remanded with directions to set aside the dismissal and to enter judgment requiring the Board to withdraw the Veterans' Administration reports from the record before it.

Reversed.

United States Court of Appeals
For the
District of Columbia Circuit
Filed Jun 12 1950
Joseph W. Stewart
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351 April Term, 1950

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Stephens, Chief Judge, and Prettyman and Stone, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to proceed in conformity with the opinion of this Court.

Per Circuit Judge Stone.

Dated June 12, 1950.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

No. 10351

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix
2. Minute entry of argument
3. Order of substitution
4. Opinion
5. Judgment
6. This designation
7. Clerk's certificate

PHILIP B. PERLMAN,
Solicitor General
Counsel for Appellee

Certificate of Service

I hereby certify that I have this day served a copy of the above designation of record on H. Russell Bishop by mailing a copy to him at his business address, 1025 Conn. Ave., N. W., Washington 6, D. C.

PHILIP B. PERLMAN,
Solicitor General

Dated: August 24, 1950.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 30, both inclusive, constitute a true copy of the joint Appendix to the briefs of the parties, and of the pleadings and proceedings of the said Court of Appeals as designated by Counsel in the case of:

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

No. 10351—APRIL TERM, 1950, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this sixth day of September, A. D. 1950.

(SEAL)

JOSEPH W. STEWART
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

COLONEL HENRY S. ROBERTSON, President, Army Review Board,
Petitioner,

v.

ROBERT H. CHAMBERS, *Respondent*

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

(a) Joint Appendix
(b) Minute entry of argument
(c) Order of substitution
(d) Opinion
(e) Judgment
(f) The designation of record
(g) Clerk's certificate

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court of the United States the entire transcript of record, and it is agreed that the parties hereto may refer in their briefs to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner

H. RUSSELL BISHOP,
Counsel for Respondent

Dated: September 5, 1950.

☆ U.S. GOVERNMENT PRINTING OFFICE 1950—905212/P.O. 133

Supreme Court of the United States

No. 295, October Term, 1950

Order allowing certiorari

Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

916610—50 U. S. GOVERNMENT PRINTING OFFICE: 1950